

The Exit Door

Maximilian Steinbeis

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Is Poland on its way out of the EU? [Claims abound](#) that a „legal Polexit“ is imminent after the madness that the Polish „Constitutional Tribunal“ [brought into the world](#) yesterday. The institution formerly known as the Constitutional Tribunal of the Republic of Poland, illegally captured since 2015, degenerated into a subservient tool of the PiS government and no longer worthy of its official name, yesterday declared core elements of EU primary law incompatible with the Polish constitution at the request of the PiS Prime Minister. As far as I can gather from the [English translation](#) of the operative part and as far as this document can be taken seriously as a legal text at all, this institution envisages Poland's future EU membership in such a way that EU law and ECJ rulings will in principle only be binding within the limits drawn by the Polish constitution as interpreted by the Polish „Constitutional Tribunal“ and thus by the PiS government. This applies above all where the independence of the judiciary is at stake, but is not at all limited to this.

In case of a conflict between EU law and domestic law, including the constitution – to cite an example, [Article 12a \(4\) of the German Grundgesetz](#) – the former prevails over the latter. This has been an [elementary part of the European legal community](#) for half a century, three and a half decades longer than Poland has even been an EU member. Breaking with this, in fact, terminates the „basis for business“ (*Geschäftsgrundlage*) for the entire European integration, as [Franz Mayer](#) called it yesterday. The question is, however: what will follow from this?

The direct path to Polexit leads via Art. 50 TEU, the voluntary withdrawal norm of Brexit fame. One could come up with the idea that the „Constitutional Tribunal“'s revocation of the *Geschäftsgrundlage* amounts to a full-blown decision to withdraw from the EU (along the lines of a highly controversial proposal [Christophe Hillion](#) made here last year already). That sort of interpretation is in principle not an unfamiliar move for German lawyers who are used to infer the true will of a person from his actions and hold him to it, even if he has not explicitly expressed or even denied it. But quite apart from the question of how such an implied withdrawal is supposed to be compatible with the need for a formally notified declaration by the Polish government (Art. 50 para. 2 TEU) – no will to withdraw can be inferred from this ruling, even if it revokes the *Geschäftsgrundlage* of European integration a hundred times over. That is what makes the situation so desperate: The Polish government [has no wish whatsoever](#) to take Poland out of the EU. They may well intend to harm the EU, but they prefer to do so from within.

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The presentation will be held in English and will be followed by a discussion by Professor Anja Seibert-Fohr (Judge at the ECHR – Heidelberg University) and debates with the audience in French.

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What about an „indirect“, a „legal Polexit“ as some are calling it? [Daniel Sarmiento](#) argues that the consequences of this ruling, as far as the PiS government implements it (and has it published in the Official Gazette in the first place), would cause much the same effect as a formal declaration of withdrawal: „The Treaties shall cease to apply to the State in question ...“ (Article 50(3) TEU). After this ruling, and without an independent judiciary, there can be no integration through law, no principle of mutual recognition, no more referrals to the ECJ, nothing.

The talk of „legal Polexit“ suggests that such EU membership in name only could somehow be a stable condition: Okay, Poland, you made your bed, now lie in it. You chose to no longer participate in the community of law. That's your loss, not our's.

I am not convinced. Unless their government, God forbid, pushes the Article 50 button, Poles remain citizens of the European Union. According to Article 47(2) of the European Charter of Fundamental Rights, they have „the right to a fair and public

hearing within a reasonable time by an independent and impartial tribunal previously established by law“ as much as any German or Frenchwoman. As long as that is the case, I find it hard to see how the legal community can accept that they should be denied access to it.

Whether Poland has a future as a member of the EU, and which future, is not a legal question but a political one. There is no procedure in the EU treaties for throwing out a member state against its will. The exit, if any, must be made by the member state himself, which must [press the Article 50 button](#) in accordance with the rules laid down by its own constitution. And it can still take back this decision until the last moment. No one is expelled from of the EU against their will. No one takes the responsibility for the decision to remain a member or not away from the member state in question.

The EU can take Poland by this responsibility. At the moment (the opposition wants to change this and is demanding a two-thirds majority), a majority in the Sejm is sufficient for withdrawal, and the PiS government is in control of that for the time being: This means that the decision on the continuation of membership is their responsibility and no one else's. The EU has a powerful financial lever in its hand, on the one hand with the NextGenerationEU billions, on the other hand with the new rule-of-law mechanism that allows cuts in transfer payments to protect the EU budget – a necessity that can certainly be justified even better than before after yesterday's „verdict“. The Commission should not fear to use it. The PiS government can now only escalate the conflict by pressing the Article 50 button – a move which would most likely be their undoing, if they were panicky and stupid enough to actually execute it. And if it isn't and they are in fact rewarded by an electoral victory: well, then and only then would Polexit indeed be the free and democratic decision of the sovereign Republic of Poland, which would have to be respected despite all regrets.

This presupposes, of course, that the EU Commission seizes the opportunity to revoke its [fatal promise](#) of last December not to activate the rule-of-law mechanism for the time being. As is well known, the Council, with the approval of Commission President von der Leyen, in blatant disregard of its competences, had agreed to „suspend“ the rule of law mechanism until the ECJ had ruled on the complaints of Hungary and Poland against it. Next week, these lawsuits will be heard in Luxembourg, and if there was no reason to wait for the ruling before, there is even less now. In revoking this awful „suspension“, the Commission could help to dispel some of the doubts that it has managed to arouse through its appeasement policy towards Hungary and Poland. This would be important because the commitment of the EU institutions themselves to the rule of law must be beyond any doubt, if only because of Article 23 (1) of the *Grundgesetz* which links the participation of the Federal Republic of Germany in the development of the European Union to it. Let no one claim that we do not take national constitutional law seriously.

Thanks to Alexander Thiele for his valuable input.

The Week on Verfassungsblog

Do the EU in particular and **constitutionalism** in general have cause for self-criticism? Absolutely, says [MICHAEL WILKINSON](#), in whose eyes constitutionalism and populism are both related forms of authoritarian liberalism and the former created the conditions for the latter to flourish in the first place.

Britain has already exited the EU and its currently facing all sorts of gloating from Europe. After all, it could have been foreseen that there would be a **labour shortage** after Brexit. Now the British government is trying to tackle the problem by introducing temporary visas for migrant workers and by employing prisoners to cover the shortage. [VIRGINIA MANTOUVALOU](#) explains what would have to happen legally for both to work under fair conditions.

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*Das Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht sucht zum nächstmöglichen Zeitpunkt eine **Leitung der Institutsverwaltung** in Vollzeit. Es handelt sich dabei um eine unbefristete Anstellung zu den Bedingungen des TVöD-Bund.*

Der Tätigkeitsbereich umfasst u. a. die Leitung der Verwaltungsbereiche (Finanzen, Personal, Einkauf, Betriebstechnik, allgemeine Dienste, Veranstaltungsmanagement) mit derzeit 21 Mitarbeitenden. Weitere Informationen dazu gibt es [hier](#).

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The EU must not conclude trade and fisheries agreements with Morocco that extend to occupied **Western Sahara** without including the *Saharawi* people. [EVA KASSOTI](#) comments on this decision of the EU General Court and its significance under international law. [JED ODERMATT](#), on the other hand, looks at how the EU authorities could obtain the „consent“ of the people of Western Sahara.

What about the Taliban's responsibility under international criminal law in **Afghanistan**? [MARCO VÖHRINGER](#) investigates this question. Since the Taliban rule de facto, Afghanistan could theoretically be held accountable for their crimes in an interstate lawsuit, but this would imply recognition of the Taliban government. For this reason, Chief Prosecutor Karim Ahmad Khan's approach of prosecuting the Taliban at the International Criminal Court makes more sense.

Speaking of Afghanistan: Our first online symposium on 9/11 twenty years after has started, tracing the impact of the attacks on international law. Two decades of war in Afghanistan were among them, ending a few weeks ago with the humiliation and retreat of western allied forces, which raises questions about **responsibility to protect** not only at the beginning and during but also at the end of a military campaign. [THILO MARAUHN](#), [DANIEL MENGELER](#) und [VERA STROBEL](#) do think that Germany has failed its duties in this respect. [FRÉDÉRIC MÉGRET](#) examines the „intermediate solidarity“ of Western states for their Afghan interpreters and contrast this „sense of patriotic noblesse oblige to former allies with a more critical international evaluation of the status of these interpreters“. [ASAD KIYANI](#) deconstructs the Western exceptionalism with respect to international crimes. [HELMUT AUST](#) and [JANNE NIJMAN](#) focus on the urban dimension of the 9/11 attacks. And [JOCHEN VON BERNSTORFF](#) warns against letting the current and somewhat self-centred debates about the 20 years of Western presence in Afghanistan and its inglorious end obscure the considerable collateral legal nihilism accompanying the „war against terror“. Further contributions will follow in this online symposium which I already warmly recommend for your attention.

In a recent opinion, the Inter-American Court of Human Rights found that unlimited **presidential re-elections** are a violation of Inter-American human rights standards. In doing so, it sets substantive limits on how states can design their electoral systems. This is a far-reaching and courageous step, write [CHRISTINA BINDER](#) and [MARIELA MORALES ANTONIAZZI](#).

[DAILOR SARTORI JUNIOR](#) and [CAROLINA A. VESTENA](#) report on the largest indigenous mobilisation in **Brazil's** history at the end of August 2021. Organised by the Association of Indigenous Peoples of Brazil (APIB), more than five thousand indigenous people from 117 different groups set up camp in the capital Brasilia to protest against the further erosion of their rights.

In Germany, TV presenter Jan Böhmermann's team revealed that various ministries targeted voters on Facebook with messages tailored to specific target groups in the run-up to the Bundestag elections. For [DIANA ZU HOHENLOHE](#), such **microtargeting** is the use of official resources for the election campaign and thus a blatant violation of the constitution.

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*All best,
the Verfassungsblog team*

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So much for this week. All the best to you, stay safe and healthy, please support us on [Steady](#) and/or [Paypal](#), and see you next week!

Max Steinbeis

